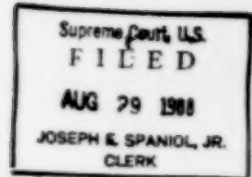


NO. 87-5765



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

KEVIN H. STANFORD

PETITIONER

versus

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO
SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

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This is a capital case in which the petition for writ of certiorari was filed November 2, 1987. Among the questions presented therein is whether or not the Eighth Amendment exempts from capital punishment a 17 year old murderer, such as the petitioner, by reason of his age.

After Kentucky filed its brief in opposition to Stanford's petition, the Court held in Thompson v. Oklahoma, 56 U.S. Law Week 4892 (June 29, 1988) (plurality decision) that 15 year old murderers are so exempted.

On the day after Thompson was announced, the Court granted certiorari in a tandem of cases to consider whether or not 16 and 17 year old murderers should likewise be exempted from

capital punishment. High v. Zant, 87-5666 (11th Cir. Ga., 619 F.2d 988) and Wilkins v. Missouri, 87-6026 (Mo. S.Ct. 736 S.W.2d 410).

Stanford then filed the supplemental petition to which this brief in opposition is addressed. Kentucky has agreed to file a combined amici curiae brief for Georgia and Missouri in High v. Zant and Wilkins v. Missouri, which should be incorporated here. In the meantime, Kentucky additionally submits the following abbreviated response because this is a capital case.

ARGUMENT

In Thompson v. Oklahoma, supra, a four-Justice plurality ruled that the execution of a 15 year old murderer would constitute cruel and unusual punishment for essentially two reasons. First, it was observed that many death penalty States had enacted legislation limiting such punishment on the basis of age. All the death penalty States having a minimum age requirement had set a limit of at least 16 years. Adding those States together with the ones which do not authorize capital punishment under any circumstances, the plurality Opinion found a national consensus that murderers under the age of 16 years should not be sentenced to death. Further evidence of this consensus was found to exist among the resolutions of respected professional organizations such as the American Bar Association, and the laws of other civilized countries such as the Soviet Union. (Slip Opinion at 13).

Beyond the foregoing indicia of a national consensus was the rarity of jury verdicts sentencing 15 year old murderers to death. The infrequency of such executions led the plurality to conclude that the practice was intolerably cruel and unusual. (Slip Opinion at 14-16).

It is because the plurality confined its Opinion to the below-16 age group^{1/} that the 17 year old petitioner here relies upon the one-Justice concurrence. The latter Opinion declined to infer a national consensus on the matter, noting that the federal government as well as 19 States apparently authorize capital punishment of persons under 16 years of age. Although the concurring Opinion acknowledged the probability that such a consensus exists, its holding was based instead on the failure of those jurisdictions to have specified whether a minimum age was intended or at least had been contemplated. Thus, there was a "considerable risk" that Oklahoma had not actually intended that murderers of this age group be eligible for capital punishment. - Absent any indication that the Oklahoma legislature had considered this particular consequence, its death penalty statute was impermissibly ambiguous in comparison with those of other States having an express age limit. (Slip Opinion at 10).

Stanford points out that prior to the commission of his crimes, Kentucky's legislature enacted a new juvenile code which was repealed before it ever took effect. Among the provisions of that new code would have been an age limit of 18 for capital punishment. Because it never became law, however, Stanford was sentenced under a statute which set no age limit for capital punishment. Only after Stanford's trial did Kentucky give effect to a statute specifying a minimum age for capital punishment. That minimum age is 16 years. KRS 640.040(1).

1/. "[Thompson's] counsel and various amici curiae have asked us to 'draw a line' that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." (Slip Opinion at 21).

Stanford's supplemental petition urges that his sentence must be vacated because his trial preceded an effective statute limiting capital punishment on the basis of age. Since the plurality in Thompson v. Oklahoma, supra did not reach the question regarding Stanford's age group, he relies primarily upon the concern expressed by the concurring Opinion, i.e., that a juvenile would be sentenced to death without the State having indicated it had at least considered a minimum age. The problem with Stanford's argument, however, is that prior to the crimes for which he was tried the Kentucky legislature had undeniably considered the reach of its death penalty statute.

Consequently, neither the plurality nor the concurrence in Thompson is supportive of Stanford's argument. His death sentence cannot be ascribed to inadvertence by the Kentucky legislature, and the question concerning this age group was expressly left open in Thompson.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the Respondent's Brief in Opposition to Supplemental Petition for Writ of Certiorari have been mailed, U.S. Postage prepaid, to Hon. Frank W. Heft, Jr., Chief Appellate Defender and Hon. Daniel T. Goyette, Jefferson District Public Defender, 200 Civic Plaza, 719 West Jefferson Street, Louisville, Kentucky 40202 on this the 26th day of August, 1988.


Assistant Attorney General